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9 Situated

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF ILLINOIS**
12 **EASTERN DIVISION**

13 **IN RE: NATIONAL**
14 **COLLEGIATE ATHLETIC**
15 **ASSOCIATION STUDENT-**
16 **ATHLETE CONCUSSION**
17 **LITIGATION**

18 MDL NO. 2492
19 Master Docket No. 13-cv-09116
20 Judge John Z. Lee

21 **PLAINTIFF-APPELLANT'S OPPOSITION TO**
22 **IMPOSITION OF APPEAL BOND**

23 Timothy J. McIlwain, counsel for the above listed parties, pursuant
24 respectfully opposes the imposition of an appeal bond, or an appeal bond in the
25 amount sought by settlement class counsel. An appeal bond in the sought amounts
26 by settlement class counsel would foreclose all but the wealthiest of litigants from
27 access to the courts.

28 **I. PRELIMINARY STATEMENT**

29 Counsel, Timothy J. McIlwain, ("McIlwain) was solicited by the Hausfeld
30 International LLC to assist them in their pursuit of lead counsel status in the

1 above-entitled action.¹ For five years, McIlwain obtained additional members of
 2 the class, reviewed medical reports to determine if the player fit within the class
 3 parameters and obtained other experts to buttress the case.

5 On January 13, 2017, the final deadline for filing applications for attorneys'
 6 fees. the law firms in the case filed their applications. (See Settlement Class
 7 Plaintiff's Brief pg 3.) Attorney McIlwain, a sole practitioner, filed his application
 8 a day or so after the deadline. Attorney McIlwain was out of the country on the
 9 day the other firms filed their applications and his paralegal had problems with the
 10 electronic filing. He submitted three applications for minimal attorney's fees in
 11 contrast to the millions of dollars obtained by leading counsel.² All three
 12 applications were summarily denied by the settlement court. The law firm of
 13 Hagens Berman Sobol Shapiro ("HBSS") to date, is the only firm opposing
 14 McIlwain's appeal.³ In order to force an end to the appeal, HBSS filed the instant
 15 motion for imposition of a bond.

20 **II. LEGAL ARGUMENT**

22 _____
 23 ¹ As of the filing of this motion, Hausfeld International LLC had 49 attorneys and 9 paralegals in their U.S.
 24 offices. They also have offices in London, Berlin, Brussels, Dusseldorf and Stockholm.

25 ² As this court is undoubtedly aware, none of the class members is receiving a penny from this settlement.
 26 They are getting "medical monitoring" (not necessarily treatment) and "protocols" to attempt to avoid injuries
 27 to future athletes. Plaintiff's opposition counsel alleges McIlwain's appeal delays implementation of the
 "benefits." McIlwain is at a loss to see how, for the implementation of the protocols at least, they would have
 to be delayed at all. The real consequence that HBSS primarily objects to is the delay in receiving their
 attorneys' fees.

28 ³ As of the date of this filing HBSS had 85 attorneys spread over 9 offices in the
 United States.

1 **A. The Amount Class Counsel Is Seeking As**
2 **a Bond Is Not Properly Included As “Costs.”**

3 HBSS has filed their motion pursuant to Fed. R. App. P 7. Rule 7 states, in
4 relevant part, “In a civil case, the District Court may require an appellant to file a
5 bond or other security in any form and amount necessary to ensure payment of
6 costs on appeal. Rule 39 states, that the costs taxable in the District Court consists
7 of:

10 (1) the costs of preparation and transmission of the record;
11
12 (2) the reporter’s transcript if necessary, to determine the appeal;
13
14 (3) premiums paid for a bond or other security to preserve rights pending
15 appeal and
16
17 (4) the fee for filing notice of appeal.

18 In the case at bar, preparation of the record is minimal since it would
19 consist of Appellant’s fee applications, the court’s denials and the final judgment
20 which is already part of the appellate record.

21
22 There’s no necessity for preparation of a transcript. No bond for the
23 premium is necessary and the fee for filing the notice of appeal has already been
24 paid.

25
26 HBSS primarily relies upon *Heekin v. Anthem* , Inc. No. 1:05-cv-01908-
27 TWB-TAB to justify the imposition of the alleged additional administrative costs
28

1 that would be engendered by the appeal.

2
3 The reasoning in *Heekin*, however has been called into question by a case in
4 this district, *In Re Navistar Diesel Engine products Liability Litigation*, Case No. 11C
5 2490, MDL No. 2273, 2013 WL 4052673 (N.D. Ill. Aug. 12, 2013). In, *Navistar*,
6 Plaintiffs, similarly to HBSS, requested the court impose an appeal bond of
7 \$77,000.00 on one of the objectors to a class action. \$52,000 was alleged as
8 representing the “administrative costs of the delay caused by the appeal,” and
9 \$25,000.00 representing the direct taxable costs of the appeal. The court instead
10 imposed a bond of \$5,000.00 deeming it more appropriate. The court found the
11 Plaintiff’s estimate of the direct costs to be wildly inflated and the requested bond to
12 cover the alleged administrative costs that would be caused by the delay to not be
13 authorized by Rule 7.

14
15 In the case at bar, similarly to the Plaintiffs in *Navistar*, “[t]here is no
16 reasonable possibility that the expense of preparing transcripts (likely just the
17 preliminary approval and final approval hearings regarding the settlement), the
18 expense of duplicating the record, the expense of duplicating the briefs, and the
19 appellate filing fee will approach this amount. **Rule 7 is not intended to authorize a**
20 **court to impose a bond in order to deter or prevent an appeal.”** *2 As to the
21 administrative costs of delay,

22
23 Plaintiffs also cite decisions by a number of district
24 courts that have concluded, in situations like the
25 present one, that Rule 7 allows a court to require an
26

appellant to post a bond in an amount sufficient to cover extra administrative costs that a party otherwise would not have incurred. See, e.g. upon *Heekin v. Anthem*, Inc. No. 1:05-cv-01908-TWP, WL 752637 at * 1-2 (S.D. Ind. Feb. 27. 2013) [Accompanying cites omitted]. **This court, respectfully, does not find these decisions persuasive. None of them explains how a rule that expressly allows requiring a bond only to secure payment of recoverable costs (which under some statutes, included recoverable attorney's fees) can be read to authorize posting a bond to secure payment of expenses that are not recoverable costs.**

Ibid (Emphasis added.)

(Exhibit 1 in Opposition to HBSS's Motion for Imposition of Bond, hereafter "Exhibit").

B. The Four Factors That Determine Whether To Impose A Bond
Militate Against Setting A Bond In the Instant Case.

In deciding whether to impose an appeal bond, the courts look at four factors:

(1) the appellant's financial ability to post a bond. In this case, McIlwain's

ability to post a bond is extremely limited. (Attached please find a copy

McIlwain's 2018 tax return showing \$31,000.00 in income.) (Exhibit 2-

entered under seal). Ironically, HBSS “presumes” McIlwain’s financial

ability to post their requested bond. HBSS has been diligent in opposing

⁴ McIlwain's attempts to make a living in at least two other pending cases

(2) The risk of non-payment of appellee's costs if the appeal is unsuccessful

As stated above it is highly unlikely that the taxable costs would exceed McIlwain's

⁴ McIlwain v. Brown, United States District Court Central District of California; 2:18-cv-05275-DMG-SKx; McIlwain, LLC v. Hagens Berman Sobol Shapiro, Northern District of California.

1 ability to pay.

2 (3) The merits of the appeal. The salient factor in the present case is that
3 there was no prejudice to any party by McIlwain's slight delay in submitting his
4 application for attorney's fees. Many larger fee issues had not been resolved. By
5 HBSS's own admission the court extended the time to allow counsel to produce
6 billing records to corroborate their fee applications. It's certainly arguable that those
7 fee applications were not completed by January 13, 2017, and if strict application of
8 the court's order was to be adhered to, the applications from the other counsel should
9 have been rejected as well.

10 (4) Whether the appeal is being brought in bad faith, or constitutes vexatious
11 conduct. HBSS is trying to piggy-back the issue of whether the appeal has merit, with
12 the issue of whether the appeal is being filed for vexatious reasons, or in bad faith.

13 In the sole case cited by HBSS, *Heekin v. Anthem* , Inc. No. 1:05-cv-01908-
14 TWP, WL 752637 (S.D. Ind. Feb. 27. 2013), the court found the appellant's class
15 action objector's appeal was brought for vexatious reasons, or in bad faith, when the
16 appellant was represented by an attorney who had not filed an appearance, had
17 previously applied to appear *pro hac vice*, but had withdrawn his application when the
18 court scheduled a teleconference. Furthermore, there was evidence that the attorney
19 was a serial objector.

20 In *Disability Rights New Jersey, Inc. v. Velez*, the court found the defendant
21 had filed frivolous defenses, when the defendant persisted in clinging to special

defenses that had no application to the case. For example, defendant filed special defenses stating that monetary damages were not chargeable to Defendant as a result of contributory negligence, assumption of risk, third party intervention, failure of proximate causation, and/or unavoidable circumstances. The plaintiff had not sought monetary damages as relief in its complaint. It solely sought injunctive relief.

Compared to these two cases, McIlwaine's appeal could hardly be ruled to be either frivolous, vexatious, or brought in bad faith. The Appellant is merely seeking recompense for five years of effort that he undertook at the request of one of the lead counsel in the case. The fee sought constitutes 0.0036 of the total fees awarded to settlement class counsel.⁵

III. CONCLUSION

The most recent filing from HBSS in this case (Dkt # 572) argues that the appeal from McIlwain should not affect the determination of an effective date for implementation of the settlement agreement. This argument certainly seems to undercut HBSS's claim for the necessity of an appeal bond to cover the costs of delayed administrative expenses. Consequently, and for the reasons stated above, Appellant respectfully requests this Honorable Court deny Settlement Class Counsel's request for an appellate bond, or, if the court finds within its discretion that one is

⁵ This calculation does not include the fees awarded to objectors' attorneys. Even opposing counsel, HBSS concedes that there's no evidence to support a finding that appellant is acting in bad faith or committing vexatious conduct. (HBSS Memorandum of Law pg.9).

1 necessary, the minimum amount that is appropriate to the case.
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3

4 Respectfully Submitted,
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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**IN RE: NATIONAL
COLLEGIATE ATHLETIC
ASSOCIATION STUDENT-
ATHLETE CONCUSSION
LITIGATION**

MDL NO. 2492
Master Docket No. 13-cv-09116
Judge John Z. Lee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Imposition of Bond with the Clerk of the Court of the United States District Court for the District of Illinois, Eastern Division , by using the CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

(X) Certificate of service when all case participants are cM/ecf participants.

Dated: This Day of October, 2019.

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